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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Christina Moore, et al.,

No. CV-23-01277-PHX-SMM

10 Plaintiffs,

ORDER

11 v.

12 Cushman & Wakefield U.S. Incorporated,
13 Defendant.

14 Before the Court is Plaintiff's Motion for Partial Summary Judgement. (Doc. 89).
15 The Motion is fully briefed. For the following reasons, the Court grants the Motion.

16 **I. BACKGROUND**

17 Plaintiff, Christine Moore, brought a claim against Defendant, Cushman &
18 Wakefield, asserting discrimination and retaliation against her in violation of the Age
19 Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (“ADEA”). (Doc. 90) at SOF
20 1. In its answer, Defendant plead the affirmative defense of “Failure to Mitigate.” (Doc.
21 13.) At the close of discovery, Plaintiff brought this Motion for Partial Summary
22 Judgement, asserting that Defendant has failed to create a genuine issue of material fact as
23 to the applicability of the affirmative defense.

24 **II. LEGAL STANDARD**

25 A party seeking summary judgment “bears the initial responsibility of informing the
26 district court of the basis for its motion[] and identifying those portions of [the record]
27 which it believes demonstrate the absence of a genuine issue of material fact.” Celotex
28 Corp. v. Catrett, 477 U.S. 317, 322 (1986). Summary judgment is appropriate if the

1 evidence, viewed in the light most favorable to the nonmoving party, shows “that there is
 2 no genuine issue as to any material fact and that the movant is entitled to judgment as a
 3 matter of law.” Fed. R. Civ. P. 56(c). Only disputes over facts that might affect the outcome
 4 of the suit will preclude the entry of summary judgment, and the disputed evidence must
 5 be “such that a reasonable jury could return a verdict for the nonmoving party.” Anderson
 6 v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

7 **III. ANALYSIS**

8 The doctrine of mitigation of damages prevents an injured party from recovering
 9 damages that could have avoided if the injured party had taken reasonable efforts after the
 10 wrong was committed. See Jackson v. Shell Oil Company, 702 F.2d 197 (9th Cir. 1983).
 11 As the entity asserting an unreasonable failure to mitigate damages, Defendant bears the
 12 burden of proof. Id. To avail oneself of the affirmative defense of failure to mitigate, a
 13 Defendant must prove “that, based on undisputed facts in the record, during the time in
 14 question there were substantially equivalent jobs available, which [the plaintiff] could have
 15 obtained, *and* that [the plaintiff] failed to use reasonable diligence in seeking one.” Odima
 16 v. Westin Tucson Hotel, 53 F.3d 1484 (9th Cir. 1995) quoting EEOC v. Farmer Bros.
 17 Co., 31 F.3d 891, 906 (9th Cir. 1994) (emphasis in original). Crucially, this is a two-
 18 element test. Enriquez v. Gemini Motor Transp. LP, No. CV-19-04759-PHX-GMS, 2021
 19 WL 5908208 (D. Ariz. 2021) (“Although other circuit courts have held that a defendant
 20 need not prove the availability of substantially equivalent jobs if it can show that the
 21 employee failed to use reasonable diligence, the Ninth Circuit has not modified the general
 22 rule, which requires the defendant to show both elements.”); See also, Bell v. VF Jeanswear
 23 LP, No. CV-14-01916-PHX-JJT, 2018 WL 1034952 (D. Ariz. 2018), aff'd, 819 F. App'x
 24 531 (9th Cir. 2020); Kawar v. JPMorgan Chase & Co., No. CV-08-0046-PHX-DGC, 2009
 25 WL 1698918 (D. Ariz. 2009).

26 Defendant’s opposition can be summarized, in its own words, as follows: “Summary
 27 [J]udgment on Defendant’s failure to mitigate defense is improper because Plaintiff
 28 ultimately accepted an inferior position, and because there is evidence inferring that she

1 intended to ignore large companies with greater financial upside, contrary to her duty to
2 seek ‘substantially equivalent employment.’” See (Doc. 119) at 5. What is notably absent
3 from this opposition, is an indication as to where in the factual record thus developed there
4 is a dispute of material fact as to whether there were substantially equivalent jobs available
5 to Plaintiff. Although citing to Odima, and correctly stating the Ninth Circuit’s test on a
6 mitigation defense, Defendant does not address Plaintiff’s contention that the record does
7 not contain evidence of substantially equivalent jobs being available.

8 Defendant’s Statement of Facts indicate there are several material factual disputes
9 as to Plaintiff’s reasonable diligence in pursuit of substantially equivalent employment.
10 See (Doc. 100) at SOF 12-16. However, none of the provided facts in the record, nor
11 exhibits attached to Defendant’s Response, speak on the question of whether there were
12 substantially equivalent jobs available. Looking at the question in a light most favorable to
13 Defendant, as the non-moving party, it could be suggested that there is a dispute as to
14 whether the role of “Operations Manager” at the Cushman & Wakefield office in Phoenix
15 was available employment for Plaintiff. Id. at SOF 12; 14. However, nothing in the record
16 suggests that this is a substantially equivalent position as her previous role as “Director of
17 Operations.” Nor does Defendant attempt to argue along such line in its Response to
18 Plaintiff’s Motion. See (Doc. 119).

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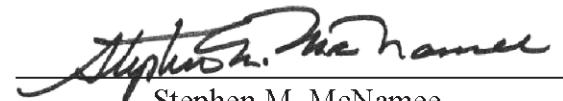
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1 Therefore, Defendant has failed to show a dispute of material fact as to one of the
2 elements it would have the burden to prove at trial to avail itself of the affirmative defense
3 of failure to mitigate. It is thus proper to grant Plaintiff's Motion for Partial Summary
4 Judgement on the affirmative defense.

5 Accordingly,

6 **IT IS ORDERED** granting the Motion. (Doc. 89).

7 Dated this 18th day of March, 2025.

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11 Stephen M. McNamee
12 Senior United States District Judge

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